Supreme Court, U.S.
FILED
05-1629 JUN 22 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
DONALD E. KEENER
JOHN ANDRE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting.

PARTIES TO THE PROCEEDINGS

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondent is Luis Alexander Duenas-Alvarez.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 6
A. The Ninth Circuit's rule is incorrect 6
B. The Ninth Circuit's rule conflicts with the rule applied by other courts of appeals 10
C. If left unreviewed, the Ninth Circuit's rule will have a substantial effect on the administration of the immigration laws 15
D. This case is the most suitable vehicle for deciding whether the Ninth Circuit's rule is correct 23
Conclusion 25
Appendix A 1a
Appendix B 3a
Appendix C 4a
Appendix D 11a
Appendix E 13a
Appendix F 16a
Appendix G 23a

TABLE OF AUTHORITIES

Cases:

Akinwummi v. *INS*, 194 F.3d 1340 (10th Cir. 1999) 23
Alam, In re, No. A42 901 272, 2005 WL 1104326 (BIA Mar. 29, 2005) 16

Cases—Continued: Page

Alvarado Velazquez v. *Gonzales*, 131 Fed. Appx. 524 (9th Cir. 2005) 20

Ambartsumyan, In re, No. A71 118 792, 2005 WL 698329 (BIA Feb. 16, 2005) 16

Barron v. *Ashcroft*, 358 F.3d 674 (9th Cir. 2004) 23

Calderon-Ortiz v. *Gonzales*, 161 Fed. Appx. 721 (9th Cir. 2006) 16

Fernandez-Bernal v. *Attorney General of the United States*, 257 F.3d 1304 (11th Cir. 2001) 23

Flores-Garcia, In re, No. A43 643 177, 2005 WL 1766801 (BIA May 2, 2005) 16

Foster v. *INS*, 376 F.3d 75 (2d Cir. 2004) 23

Hammer v. *United States*, 271 U.S. 620 (1926) 8

Huerta-Guevara v. *Ashcroft*, 321 F.3d 883 (9th Cir. 2003) 3

Lopez v. *Gonzales*, 417 F.3d 934 (8th Cir. 2005), cert. granted, No. 05-547 (Apr. 3, 2006) 14

Malacas, In re, No. A41 245 089, 2004 WL 2374341 (BIA Sept. 13, 2004) 10

Martinez-Perez v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005) 5, 16

Nye & Nissen v. *United States*, 336 U.S. 613 (1949) 8

Oliva-Osuna v. *Gonzales*, 169 Fed. Appx. 501 (9th Cir. 2006) 16

Palacios-Pinera, In re, 22 I & N. Dec. 434 (BIA 1998) 14

Pedroza-Ortiz, In re, No. A38 102 026, 2005 WL 3802196 (BIA Nov. 30, 2005) 16

Cases—Continued: Page

Penuliar v. *Ashcroft*, 435 F.3d 961 (9th Cir. 2005), amended, 435 F.3d 961 (9th Cir. 2006) 5
Penuliar v. *Gonzales*, 435 F.3d 961 (2005) ..... *passim*
Phomphakdy, In re, No. A27 833 574, 2005 WL 3709252 (BIA Dec. 30, 2005) 16
Pinkerton v. *United States*, 328 U.S. 640 (1946) 22
Popal v. *Gonzales*, 416 F.3d 249 (3d Cir. 2005) 23
Ramani v. *Ashcroft*, 378 F.3d 554 (6th Cir. 2004) 23
Rios-Zavala, In re, No. A73 891 180, 2005 WL 698515 (BIA Feb. 4, 2005) 16
Shepard v. *United States*, 544 U.S. 13 (2005) 17
Soliman v. *Gonzales*, 419 F.3d 276 (4th Cir. 2005) 3
Standefer v. *United States*, 447 U.S. 10 (1980) 7, 8
Tabrilla v. *Gonzales*, No. 04-75440, 2006 WL 679907 (9th Cir. Mar. 15, 2006) 16
Taylor v. *United States*, 495 U.S. 575 (1990) ..... *passim*
Un v. *Gonzales*, 415 F.3d 205 (1st Cir. 2005) 23
United States v. *Baca-Valenzuela*, 118 F.3d 1223 (8th Cir. 1997) 13, 14
United States v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) 15
United States v. *Garcia*, 400 F.3d 816 (9th Cir.), cert. denied, 126 S. Ct. 839 (2005) 8
United States v. *Groce*, 999 F.2d 1189 (7th Cir. 1993) 11, 12, 13
United States v. *Hathaway*, 949 F.2d 609 (2d Cir. 1991), cert. denied, 502 U.S. 1119 (1992) 11, 12, 13
United States v. *Mitchell*, 23 F.3d 1 (1st Cir. 1994) .. 12, 14

Cases—Continued: Page

United States v. *Sanchez*, 917 F.2d 607 (1st Cir. 1990), cert. denied, 499 U.S. 977 (1991) 13
United States v. *Simpson*, 979 F.2d 1282 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993) 13
United States v. *Vidal*, 426 F.3d 1011 (9th Cir. 2005) ... 13
United States v. *Vonn*, 535 U.S. 55 (2002) 25
United States v. *Williams*, 504 U.S. 36 (1992) 25
V-Z-S-, *In re*, 22 I. & N. Dec. 1338 (BIA 2000) 10, 19
Wang v. *Ashcroft*, 260 F.3d 448 (5th Cir. 2001) 23

Statutes and regulations:

Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 8
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-960, Tit. VII, § 7342, 102 Stat. 4469-4470 8
Armed Career Criminal Act of 1984:
18 U.S.C. 924(e) (2000& Supp. III 2003) 3, 11
18 U.S.C. 924(e)(1) (2000 & Supp. III 2003) 3
18 U.S.C. 924(e)(2)(B)(ii) 3
Bail Reform Act of 1984:
18 U.S.C. 3143(a)(2) 12
18 U.S.C. 3156(a)(4) 12
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a) (§ 101(a)) 8
8 U.S.C. 1101(a)(43) (§ 101(a)(43)) (2000 & Supp. III 2003) 2, 20
8 U.S.C. 1101(a)(43)(A) 20
8 U.S.C. 1101(a)(43)(B) 13
8 U.S.C. 1101(a)(43)(F) 14, 20

Statutes—Continued: Page

8 U.S.C. 1101(a)(43)(G) (§ 101(a)(43)(G)) ..... *passim*
8 U.S.C. 1101(a)(43)(U) (§ 101(a)(43)(U)) 21, 22, 23
8 U.S.C. 1158(b)(2)(A)(ii) 19
8 U.S.C. 1158(b)(2)(B)(i) 19
8 U.S.C. 1182(a)(9)(A) 19
8 U.S.C. 1227(a) (§ 237(a)) (2000 & Supp. III 2003) ... 2
8 U.S.C. 1227(a)(2) (§ 237(a)(2)) 2, 20
8 U.S.C. 1227(a)(2)(A)(i) (§ 237(a)(2)(A)(i)) ... 2, 4, 18, 19
8 U.S.C. 1227(a)(2)(A)(i)(I) 19
8 U.S.C. 1227(a)(2)(A)(iii) 4
8 U.S.C. 1228(b) 19
8 U.S.C. 1229b(a) 24
8 U.S.C. 1229b(a)(3) 19
8 U.S.C. 1252(d)(1) 23
18 U.S.C. 2 ..... 8, 10, 11, 12
18 U.S.C. 16 21
18 U.S.C. 641 10
Ala. Code § 13A-2-23 (LexisNexis 2005) 9
Alaska Stat. § 11.16.110 (2004) 9
Ariz. Rev. Stat. Ann. § 13-303(B)(2) (2001) 9
Ark. Code Ann. § 5-2-402 (1993) 9
Cal. Penal Code (West 1999):
§ 31 9
§ 484(a) (& Supp. 2006) 15
§ 487(c) 5
§ 971 (1985) 8
Cal. Veh. Code § 10851(a) (West 2000) ..... *passim*

Statutes—Continued: Page

Colo. Rev. Stat. § 18-1-603 (1986) 9
Conn. Gen. Stat. Ann. § 53a-8 (West 2001) 9
Del. Code Ann. tit. 11, § 271 (2001) 9
D.C. Code § 22-1805 (2001) 9
Fla. Stat. Ann. § 777.011 (West 2005) 9
Ga. Code Ann. § 16-2-20 (2003) 9
Haw. Rev. Stat. Ann. § 124A-112 (LexisNexis 2000) 9
Idaho Code Ann. § 19-1430 (2004) 9
720 Ill. Comp. Stat. Ann. 5/5-2 (West 2002) 9
Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004) 9
Iowa Code Ann. § 703.1 (West 2003) 9
Kan. Stat. Ann. 21-3205 (1988 & Supp. 1994) 9
Ky. Rev. Stat. Ann. § 502.020 (LexisNexis 1999) 9
La. Rev. Stat. Ann. § 14:24 (1997) 9
Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992) 9
Md. Code Ann., Crim. Proc. § 4-204 (LexisNexis 2001 & Supp. 2005) 9
Me. Rev. Stat. Ann. tit. 17-A, § 57 (West 2006) 9
Mich. Comp. Laws Ann. § 767.39 (West 2000) 9
Minn. Stat. Ann. § 609.05 (West 2003) 9
Miss. Code Ann. § 97-1-3 (West 2005) 9
Mo. Ann. Stat. § 562.041 (West 1999) 9
Mont. Code Ann. § 45-2-302 (2004) 9
N.C. Gen. Stat. § 14-5.2 (2005) 9
N.D. Cent. Code § 12.1-03-01 (1997) 9
Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003) 9
Nev. Rev. Stat. Ann. § 195.02 (LexisNexis 2001) 9

Statutes and regulations—Continued: Page

N.H. Rev. Stat. Ann. § 626:8 (LexisNexis 2001 & Supp. 2005) 9
N.J. Stat. Ann. § 2C:2-6 (West 2005) 9
N.M. Stat. § 30-1-13 (2005) 9
N.Y. Penal Law § 20.00 (McKinney 2004) 9
Ohio Rev. Code Ann. § 2923.03 (LexisNexis 2006) 9
Okla. Stat. Ann. tit. 21, § 172 (West 2002) 9
Or. Rev. Stat. § 161.155 (1987) 9
18 Pa. Cons. Stat. Ann. § 306 (West 1998) 9
R.I. Gen. Laws § 11-1-3 (1981 & Supp. 1993) 9
S.C. Code Ann. § 16-1-40 (2003) 9
S.D. Codified Laws § 22-3-3 (1979 & Supp. 1987) 9
Tenn. Code Ann. § 39-11-402 (2003) 9
Tex. Penal Code Ann. § 7.02 (Vernon 2003) 9
Utah Code Ann. § 76-2-202 (2003) 9
Va. Code Ann. § 18.2-18 (2004) 9
Vt. Stat. Ann. tit. 13, § 3 (1998) 9
Wash. Rev. Code Ann. § 9A.08.020 (West 1988) 9
W. Va. Code Ann. § 61-11-6 (LexisNexis 2005) 9
Wis. Stat. Ann. § 939.05 (West 2005) 10
Wyo. Stat. Ann. § 6-1-201 (1996) 10
8 C.F.R. 1003.1(g) 10
United States Sentencing Guidelines:
§ 2L1.2 13
§ 2L1.2, comment. (n.5) 13

Miscellaneous: Page

Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., 1st Sess. (passed Dec. 16, 2005) 21

Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess. (passed May 25, 2006) ... 22

H.R. Rep. No. 345, 109th Cong., 1st Sess. (2005) 23

2 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 7, 16, 22

2 James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) 7

In the Supreme Court of the United States

No.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 3a) and the immigration judge (App., *infra*, 4a-10a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. Section 10851(a) of the California Vehicle Code provides, in part, as follows:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense * * * .

Cal. Veh. Code § 10851(a) (West 2000).

STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. III 2003), several classes of aliens are subject to removal from the United States, including those who have been convicted of certain kinds of offenses after admission, 8 U.S.C. 1227(a)(2). Aggravated felonies comprise one such category of offenses. 8 U.S.C. 1227(a)(2)(A)(iii). The INA includes a long list of offenses that qualify as an aggravated felony, 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003), one of which is "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G).

In deciding whether a particular offense constitutes a "theft offense" under the INA, courts apply the same two-step test that this Court established in *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. III 2003).[1] See, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003). Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the defendant was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. If it does, the defendant has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, courts move to the second step, where they employ a "modified categorical" approach and review certain documents in the record of the criminal case (such as the charging instrument and judgment) to determine whether the particular offense of which the defendant was convicted satisfies the generic definition.

2. Respondent is a native and citizen of Peru. In 1992, he was convicted in the Superior Court of California of burglary, and, in 1994, he was convicted in the same court of possession of a firearm by a felon. Despite those convictions, respondent became a lawful permanent resident in 1998. App., *infra*, 6a-7a, 14a.

---

[1] Under the ACCA, defendants convicted of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they have three previous convictions for a "serious drug offense" or "violent felony." 18 U.S.C. 924(e)(1) (2000 & Supp. III 2003). The definition of "violent felony" includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii).

In 2002, respondent was charged in the Superior Court of California with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). The information alleged that respondent willfully and unlawfully drove or took a 1992 Honda Accord without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to three years of imprisonment. App., *infra*, 7a-8a, 11a-13a.

3. In February 2004, the Department of Homeland Security (DHS) initiated removal proceedings against respondent. He was charged with removability under Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude, and under Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony—in particular, a theft offense for which the term of imprisonment is at least one year, 8 U.S.C. 1101(a)(43)(G). Both charges were based on respondent's 2002 conviction. App., *infra*, 4a-5a, 7a, 9a.

The immigration judge (IJ) ruled that the California offense of unlawful driving or taking of a vehicle was not a crime involving moral turpitude but was a theft offense (and thus an aggravated felony). The IJ accordingly found that respondent was removable from the United States and ordered him removed to Peru. App., *infra*, 9a-10a.

The Board of Immigration Appeals (BIA) dismissed respondent's appeal. App., *infra*, 3a. Adopting the decision of the IJ, the BIA held that "respondent's conviction for auto theft constitutes an aggravated felony." *Ibid.*

4. While respondent's petition for review was pending in the Ninth Circuit, that court decided *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), amended, 435 F.3d 961 (2006). *Penuliar* held that a violation of California Vehicle Code § 10851(a) is not a theft offense as a "categorical" matter. 395 F.3d at 1044-1045. The Ninth Circuit reasoned that the California statute can be violated if the defendant is "a party or an accessory to or an accomplice in" the unauthorized taking of the vehicle and that such conduct does not necessarily entail the taking of property or the exercise of control over property, which the court considered an essential element of the generic definition of "theft offense." *Ibid.* *Penuliar* also held that the Section 10851(a) convictions at issue in that case were not for a theft offense under the "modified categorical" approach. *Id.* at 1045-1046. Although the charges to which Penuliar pleaded guilty described him as a principal, the court deemed that fact insufficient to establish that he had been convicted of a theft offense, because a defendant in California may be convicted as an aider and abettor even when an aiding-and-abetting theory is not recited in the charging instrument. *Ibid.*

The government petitioned for panel rehearing and rehearing en banc in *Penuliar*, arguing that the fact that Section 10851(a) criminalizes aiding and abetting does not preclude categorically treating unlawful driving or taking of a vehicle as an aggravated felony. The Ninth Circuit denied the petition, and issued an amended opinion. *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006). The court held that the government's contention was foreclosed by a decision issued after the initial decision in *Penuliar*, *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005), which held that grand theft, in violation of California Penal Code § 487(c) (West 1999), was not a

theft offense under the INA because a defendant can be convicted under an aiding-and-abetting theory. *Penuliar*, 435 F.3d at 970 n.6.

5. After the amended decision in *Penuliar* was issued, the court of appeals granted respondent's petition for review. App., *infra*, 1a-2a. The court explained that the IJ had found that respondent's conviction for unlawful driving or taking of a vehicle "categorically met the definition of a theft offense" and that the court had "recently held" in *Penuliar* that "a violation of section 10851(a) does *not* categorically qualify as a theft offense because that section is broader than the generic definition." *Id.* at 2a (emphasis added). The court therefore "remand[ed] th[e] petition to the [BIA] for further proceedings in light of *Penuliar*." *Ibid.*

REASONS FOR GRANTING THE PETITION

In granting respondent's petition for review, the Ninth Circuit applied its holding in *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006), that aiding and abetting is not encompassed by the generic definition of "theft offense" under Section 101(a)(43)(G) of the INA. That holding is incorrect; it conflicts with decisions of other courts of appeals; if left unreviewed, it will have a substantial effect on the administration of the immigration laws; and this case is the most suitable vehicle for deciding whether it is correct. This Court should therefore grant certiorari to review the Ninth Circuit's decision in this case.

A. The Ninth Circuit's Rule Is Incorrect

As this Court made clear in *Taylor* v. *United States*, 495 U.S. 575 (1990), the "generic" definition of an offense (in that case "burglary," in this case "theft offense") is the "sense in which the term is now used in the

criminal codes of most States." *Id.* at 598; accord *id.* at 589 (generic definition "correspond[s] to the definitions of [the offense] in a majority of the States' criminal codes"). In the criminal codes of *all* States, as well as in the criminal title of the United States Code, the definition of "theft" —and, indeed, of every substantive criminal offense —includes aiding and abetting, because the acts of an aider and abettor are deemed to be the acts of a principal as a matter of law, such that a defendant who aids and abets the commission of a particular offense is guilty of that offense. Aiding and abetting theft is therefore encompassed by the generic definition of "theft offense" in the INA.[2] For that reason, the fact that California Vehicle Code § 10851(a) (West 2000) makes it a crime, not only to engage in an unauthorized taking or stealing of a vehicle, but also to be "a party or an accessory to or an accomplice in the * * * unauthorized taking or stealing," is entirely unremarkable and does not take the offense outside the generic definition.[3]

While at common law "the subject of principals and accessories was riddled with 'intricate' distinctions," *Standefer* v. *United States*, 447 U.S. 10, 15 (1980) (quoting 2 James Fitzjames Stephen, *A History of the Crimi-*

---

[2] The generic definition applied by the Ninth Circuit is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Penuliar*, 435 F.3d at 969 (citation omitted). Except insofar as it excludes aiding and abetting, we do not challenge that definition in this Court.

[3] In modern criminal codes, there is no meaningful distinction among "party," "accessory," "accomplice," and "aider and abettor." See 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 13.1-13.2 (2d ed. 2003). The Ninth Circuit appears to have used the terms interchangeably. See *Penuliar*, 435 F.3d at 969-970.

nal Law of England 231 (1883)), by the early twentieth century many statutes had "abolishe[d] the distinction between principals and accessories," *Hammer* v. *United States*, 271 U.S. 620, 628 (1926). By the middle of that century, long before the term "aggravated felony" first appeared in Section 101(a) of the INA, see Pub. L. No. 100-690, Tit. VII, § 7342, 102 Stat. 4469-4470 (1988), it was "well engrained in the law" that one who aids or abets the commission of an act "is as responsible for that act as if he committed it directly," *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (quoting jury instruction). Indeed, in a different context, the Ninth Circuit has recognized the long-settled principle that "[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense." *United States* v. *Garcia*, 400 F.3d 816, 820, cert. denied, 126 S. Ct. 839 (2005).

Thus, under 18 U.S.C. 2, which was originally enacted nearly a century ago,[4] whoever "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States, or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States," is "punishable as a principal." Likewise, the Penal Code of California has abolished "[t]he distinction between an accessory before the fact and a principal," such that "all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall * * * be prosecuted, tried and punished as principals." Cal. Penal Code § 971 (West 1985).

---

[4] See Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152; *Standefer*, 447 U.S. at 18 & n.11.

The term "principals" is elsewhere defined by California statute to include "[a]ll persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." Cal. Penal Code § 31 (West 1999). The statutes of every other State (and the District of Columbia) likewise treat aiders and abettors as principals.[5]

---

[5] See Ala. Code § 13A-2-23 (LexisNexis 2005); Alaska Stat. § 11.16.110 (2004); Ariz. Rev. Stat. Ann. § 13-303 (2001); Ark. Code § 5-2-402 (1993); Colo. Rev. Stat. § 18-1-603 (1986); Conn. Gen. Stat. Ann. § 53a-8 (West 2001); Del. Code Ann. tit. 11, § 271 (2001); D.C. Code § 22-1805 (2001); Fla. Stat. Ann. § 777.011 (West 2005); Ga. Code Ann. § 16-2-20 (2003); Haw. Rev. Stat. Ann. § 124A-112 (LexisNexis 2000); Idaho Code Ann. § 19-1430 (2004); 720 Ill. Comp. Stat. Ann. 5/5-2 (West 2002); Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004); Iowa Code Ann. § 703.1 (West 2003); Kan. Stat. Ann. § 21-3205 (1988 & Supp. 1994); Ky. Rev. Stat. Ann. § 502.020 (LexisNexis 1999); La. Rev. Stat. Ann. § 14:24 (1997); Me. Rev. Stat. Ann. tit. 17-A, § 57 (2006); Md. Code Ann., Crim. Proc. § 4-204 (LexisNexis 2001 & Supp. 2005); Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992); Mich. Comp. Laws Ann. § 767.39 (West 2000); Minn. Stat. Ann. § 609.05 (West 2003); Miss. Code Ann. § 97-1-3 (West 2005); Mo. Ann. Stat. § 562.041 (West 1999); Mont. Code Ann. § 45-2-302 (2004); Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003); Nev. Rev. Stat. Ann. § 195.02 (LexisNexis 2001); N.H. Rev. Stat. Ann. § 626:8 (LexisNexis 2001 & Supp. 2005); N.J. Stat. Ann. § 2C:2-6 (West 2005); N.M. Stat. § 30-1-13 (2005); N.Y. Penal Law § 20.00 (McKinney 2004); N.C. Gen. Stat. § 14-5.2 (2005); N.D. Cent. Code § 12.1-03-01 (1997); Ohio Rev. Code Ann. § 2923.03 (LexisNexis 2006); Okla. Stat. Ann. tit. 21, § 172 (West 2002); Or. Rev. Stat. § 161.155 (1987); 18 Pa. Cons. Stat. Ann. § 306 (West 1998); R.I. Gen. Laws § 11-1-3 (1981 & Supp. 1993); S.C. Code. Ann. § 16-1-40 (2003); S.D. Codified Laws § 22-3-3 (1979 & Supp. 1987); Tenn. Code Ann. § 39-11-402 (2003); Tex. Penal Code Ann. § 7.02 (Vernon 2003); Utah Code Ann. § 76-2-202 (2003); Vt. Stat. Ann. tit. 13, § 3 (1998); Va. Code Ann. § 18.2-18 (2004); Wash. Rev. Code Ann. § 9A.08.020 (West 1988); W. Va. Code Ann. § 61-11-6 (LexisNexis 2005);

Despite the modern criminal codes' abolition of the technical distinctions between principal and accessory, the Ninth Circuit has relied on those very distinctions in formulating a narrow, principal-only definition of the generic offense. It has thereby contravened this Court's directive in *Taylor* that the "arcane distinctions embedded in the common[]law" should form no part of the "generic" definition of an offense. 495 U.S. at 593; accord *id.* at 589. The Ninth Circuit's interpretation of the INA is especially implausible because it presumes that Congress intended that a theft offense include aiding and abetting for purposes of the federal criminal laws, see 18 U.S.C. 2, but not for purposes of the federal immigration laws, such that someone convicted of (for example) aiding and abetting the theft of public money, see 18 U.S.C. 641, is subject to the same criminal penalties as a principal but not to the same immigration consequences.[6]

B. The Ninth Circuit's Rule Conflicts With The Rule Applied By Other Courts Of Appeals

In *Penuliar*, the Ninth Circuit held that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense.'" 435 F.3d at 970 n.6. That prin-

---

Wis. Stat. Ann. § 939.05 (West 2005); Wyo. Stat. Ann. § 6-1-201 (1996).

[6] As far as we are aware, the BIA has not addressed the question presented in this case in a published decision. While the BIA has held that a violation of California Vehicle Code § 10851(a) is a "theft offense" under Section 101(a)(43)(G) of the INA, *In re V-Z-S-*, 22 I. & N. Dec. 1338 (2000), the decision in that case did not address the theory subsequently adopted by the Ninth Circuit in *Penuliar*. And while the BIA has addressed, and rejected, the argument that aiding and abetting is not included within the definition of "aggravated felony" as a general matter, *In re Malacas*, No. A41 245 089, 2004 WL 2374341 (Sept. 13, 2004), the decision in that case is unpublished and has not been designated as a precedent, see 8 C.F.R 1003.1(g).

ciple is inconsistent with the principle applied by the First, Second, Seventh, and Eighth Circuits in analytically indistinguishable circumstances.

In *United States* v. *Hathaway*, 949 F.2d 609 (1991) (per curiam), cert. denied, 502 U.S. 1119 (1992), the Second Circuit held that the Vermont offense of third-degree arson is categorically an "arson" offense—and thus a "violent felony"—under the ACCA, 18 U.S.C. 924(e), and that the defendant's sentence for unlawful possession of a firearm was therefore properly enhanced. The court rejected the defendant's contention that, because the Vermont statute "prohibits secondary acts such as counseling, aiding or procuring the burning," it criminalizes activity that does not satisfy the generic definition of arson—namely, "a wilful and malicious burning of personal property." 949 F.2d at 610. The Second Circuit reasoned that this Court's decision in *Taylor* requires courts to look to "modern definitions," that "the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson," and that "[a]iding and abetting also supports a substantive conviction for arson under Federal law." *Id.* at 610-611 (citing 18 U.S.C. 2). The court therefore concluded that aiding and abetting is encompassed within the generic definition of arson. *Ibid.*

In *United States* v. *Groce*, 999 F.2d 1189 (1993), the Seventh Circuit held that the Wisconsin offense of burglary as a party to a crime is categorically a "burglary" offense—and thus a violent felony—under the ACCA, and that the defendant's sentence for unlawful possession of a firearm was therefore properly enhanced. The court rejected the defendant's contention that, because the Wisconsin statute imposes liability for being a "party to a crime," it criminalizes activity that does not

satisfy *Taylor*'s generic definition of burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 1191 (quoting *Taylor*, 495 U.S. at 598). The Seventh Circuit reasoned that "burglary as party to a crime is essentially analogous to aiding and abetting a burglary," and that "both federal law and Wisconsin state law punish an aider and abettor as a principal." *Ibid.* (citing 18 U.S.C. 2). The court therefore concluded that the generic definition of burglary "extends to the context of aiding and abetting," such that "one who aided and abetted the commission of a generic burglary has committed generic burglary." *Id.* at 1192. In so holding, the Seventh Circuit cited the Second Circuit's decision in *Hathaway*, *supra*. *Ibid.*

In *United States* v. *Mitchell*, 23 F.3d 1 (1994) (per curiam), the First Circuit held that the federal offense of aiding and abetting arson is categorically a "crime of violence" under the Bail Reform Act of 1984, 18 U.S.C. 3143(a)(2), and that the defendant was therefore properly detained pending sentencing. The court rejected the defendant's contention that aiding and abetting arson "fall[s] outside the definition of crime of violence" —namely, an offense that "has as an element * * * the use, attempted use or threatened use of physical force against the person or property of another" or that "is a felony and * * * , by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 23 F.3d at 2 & n.1 (quoting 18 U.S.C. 3156(a)(4)). The First Circuit reasoned that "aiding and abetting 'is not a separate offense' from the underlying substantive crime" and that "the *acts* of the principal [are] those of the aider and abetter as a matter of law."

Id. at 2-3 (quoting *United States* v. *Sanchez*, 917 F.2d 607, 611 (1st Cir. 1990), cert. denied, 499 U.S. 977 (1991), and *United States* v. *Simpson*, 979 F.2d 1282, 1285 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993)). The court therefore concluded that aiding and abetting is encompassed within the definition of crime of violence, such that "aiding and abetting the commission of a crime of violence is a crime of violence itself." *Id.* at 3. In so holding, the First Circuit cited the Second Circuit's decision in *Hathaway*, *supra*, and the Seventh Circuit's decision in *Groce*, *supra*. *Ibid.*

Finally, in *United States* v. *Baca-Valenzuela*, 118 F.3d 1223 (1997), the Eighth Circuit held that the federal offense of aiding and abetting possession of cocaine with the intent to distribute it categorically constitutes "illicit trafficking in a controlled substance"—and thus an aggravated felony—under the INA, 8 U.S.C. 1101(a)(43)(B), and that the defendant's offense level was therefore properly enhanced under Section 2L1.2 of the Sentencing Guidelines, which incorporates the INA's definition of aggravated felony.[7] The court explained its holding as follows:

> A fundamental theory of American criminal law is that there is no offense of aiding and abetting or accomplice liability as such. Instead, accomplice liability is merely a means of determining which persons

---

[7] Section 2L1.2 of the Guidelines has since been amended to provide, explicitly, that "[p]rior convictions of offenses counted under subsection (b)(1)"—one of which is an aggravated felony—"include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses." Sentencing Guidelines § 2L1.2, comment. (n.5). The Ninth Circuit has held that that language renders *Penuliar*'s holding inapplicable to the Guidelines. *United States* v. *Vidal*, 426 F.3d 1011, 1015 (2005).

> were closely enough related to the underlying offense to be prosecuted and convicted of that offense. Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime of *which* he is guilty is the same: whatever is the underlying offense.

Id. at 1232. In so holding, the Eighth Circuit cited the First Circuit's decision in *Mitchell*, *supra*. *Ibid.*[8]

In those four cases, the statutory offense encompassed aiding and abetting, and the First, Second, Seventh, and Eighth Circuits held that the offense categorically satisfied the generic definition of the crime at issue. If those courts had instead concluded that the possibility of aiding-and-abetting liability meant that the offense did *not* categorically satisfy the generic definition, as the Ninth Circuit held in *Penuliar*, the cases would have been decided differently.[9] Certiorari should be granted to ensure that similar cases are not decided

---

[8] This Court recently granted certiorari in *Lopez* v. *Gonzales*, No. 05-547 (Apr. 3, 2006). to decide whether a drug crime that is a felony under state law but a misdemeanor under federal law constitutes illicit trafficking in a controlled substance, and thus an aggravated felony, under the INA, 8 U.S.C. 1101(a)(43)(B). The offense at issue in that case, which was held to be an aggravated felony by the Eighth Circuit, was aiding and abetting the possession of cocaine. See *Lopez* v. *Gonzales*, 417 F.3d 934, 935 (2005).

[9] Like "theft offense" and "illicit trafficking in a controlled substance," "burglary offense" and "crime of violence" are explicitly included within the INA's definition of aggravated felony. 8 U.S.C. 1101(a)(43)(F) and (G). Arson, too, is ordinarily a crime of violence, and thus ordinarily an aggravated felony. *E.g.*, *In re Palacios-Pinera*, 22 I. & N. Dec. 434 (BIA 1998).

differently based on the circuit in which the case arises.[10]

C. If Left Unreviewed, The Ninth Circuit's Rule Will Have A Substantial Effect On The Administration Of The Immigration Laws

1. We are informed by the Department of Homeland Security that there are approximately 8000 aliens who have either been charged with removability or been ordered removed in the Ninth Circuit on the basis of a conviction for a "theft offense." Because *Penuliar* holds that a defendant who can be convicted under a theft statute for aiding and abetting has not been convicted of a "theft offense" as a categorical matter, 435 F.3d at

---

[10] In addition to four courts outside the Ninth Circuit, four judges within the Ninth Circuit have expressed their disagreement with the principle applied in *Penuliar*. One of the cases on which *Penuliar* relied (435 F.3d at 969) was *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002), where the Ninth Circuit held, en banc, that the California offense of general theft, in violation of California Penal Code § 484(a) (West 1999 & Supp. 2006), was not a theft offense. The court noted in *Corona-Sanchez* that a defendant could be convicted of that offense under an aiding-and-abetting theory. 291 F.3d at 1207-1208. In a dissenting opinion joined by Judges Kozinski, T.G. Nelson, and Kleinfeld, Judge Rymer rejected the court's reasoning:

> It cannot be that the possibility of being liable as an aider or abettor takes an offense out of the running, for this is true of any crime in California, where principals include those who aid or abet the commission of a crime. Cal. Penal Code § 31. In any event, "[t]o be liable as an aider and abettor, the defendant must have instigated or advised the commission of the offense or have been present for the purpose of assisting." 1 Witkin & Epstein, *California Criminal Law* (3d ed)., § 78, p. 124 (2000). This is unremarkable, and well within the bounds of whichever generic formulation is adopted.

291 F.3d at 1216.

969-970, and because defendants in every jurisdiction can be convicted under a theft statute for aiding and abetting, the government's ability to remove those 8000 aliens has been called into serious doubt.[11] The Ninth Circuit has already granted petitions for review on the basis of *Penuliar* in a number of cases (in addition to this one), see *Tabrilla* v. *Gonzales*, No. 04-75440, 2006 WL 679907 (Mar. 15, 2006); *Oliva-Osuna* v. *Gonzales*, 169 Fed. Appx. 501 (2006); *Calderon-Ortiz* v. *Gonzales*, 161 Fed. Appx. 721 (2006), and the BIA has sustained claims under *Penuliar* in a number of others, see, *e.g.*, *In re Phomphakdy*, No. A27 833 574, 2005 WL 3709252 (Dec. 30, 2005); *In re Pedroza-Ortiz*, No. A38 102 026, 2005 WL 3802196 (Nov. 30, 2005); *In re Flores-Garcia*, No. A43 643 177, 2005 WL 1766801 (May 2, 2005); *In re Alam*, No. A42 901 272, 2005 WL 1104326 (Mar. 29, 2005); *In re Ambartsumyan*, No. A71 118 792, 2005 WL 698329 (Feb. 16, 2005); *In re Rios-Zavala*, No. A73 891 180, 2005 WL 698515 (Feb. 4, 2005). Many more cases that raise a claim under *Penuliar* are pending before the Ninth Circuit, the BIA, and IJs. The result in those cases, and in future ones, is likely to be the same unless the Court grants certiorari in this case.

---

[11] The automobile-theft statute under which respondent was convicted, California Vehicle Code § 10851(a), includes its own aiding-and-abetting provision. But *Penuliar*'s "categorical" holding would presumably apply even when the alien was convicted under a theft statute that does not explicitly include such a provision, because the general rule is that a defendant charged as a principal can be convicted as an aider and abettor. See 2 LaFave, *supra*, § 13.1(e), at 335 & nn. 89-90. Indeed, it appears that the two cases on which the Ninth Circuit relied in *Penuliar*—*Corona-Sanchez* (which involved California's general-theft statute) and *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005) (which involved California's grand-theft statute)—are cases of that type.

2. There is little reason to think that the Ninth Circuit's rule would be mitigated by the fact that, under the "modified categorical" approach, an alien will be deemed to have been convicted of a "theft offense" if it can be shown, based on documents in the record of the criminal case, that he was convicted as a principal. On the contrary, under the "modified categorical" holding of *Penuliar*, even an alien—like respondent—who was explicitly charged as a principal will not be deemed to have been convicted of a "theft offense" on the basis of the charging instrument (and corresponding judgment), because "an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against a principal." 435 F.3d at 971.[12] The very fact that the Ninth Circuit ignored in erroneously holding that a violation of California Vehicle Code § 10851(a) is not categorically a theft offense—that criminal statutes uniformly treat aiders and abettors as indistinguishable from principals—means that the other materials that may be considered under the "modified categorical" approach are unlikely to distinguish between principals and aiders and abettors.

For aliens who pleaded guilty to the charge, the government might be able to establish that the conviction was for a "theft offense"—if it could show that the defendant admitted during the plea colloquy that he acted alone or was a "true principal." Cf. *Shepard* v. *United States*, 544 U.S. 13, 21 (2005) (transcript of plea colloquy may be used to determine whether defendant pleaded

---

[12] The information to which respondent pleaded guilty alleged that he "did willfully and unlawfully drive or take a * * * 1992 Honda Accord * * * without the consent of [the owner] and with the intent to permanently or temporarily deprive the * * * owner of title to and possession of said vehicle." App., *infra*, 13a.

guilty to generic "burglary"). But plea colloquies are not always transcribed; when they have been transcribed, the transcripts are often unavailable or difficult to obtain; and when the transcripts can be obtained, they may reflect little more than that the defendant admitted committing the statutory offense. Similarly, for aliens who were found guilty after trial, the government might be able to establish that the conviction was for a "theft offense" if it could show that the jury was not instructed on an aiding-and-abetting theory and therefore must have found that the defendant was a principal. Cf. *Taylor*, 495 U.S. at 602 (jury instructions may be used to determine whether jury found defendant guilty of generic "burglary"). But transcripts of the jury charge (like transcripts of a plea colloquy) are often unavailable or difficult to obtain; and even when they can be obtained, they may show that, as is often the case, the jury was instructed that it could find the defendant guilty *either* as a principal *or* as an aider and abettor, in which case it will be impossible to know whether the defendant was convicted as a principal. For these reasons, there likely will be few cases in which an alien could readily be shown to have committed a "theft offense" under the Ninth Circuit's "modified categorical" approach.

3. Some aliens convicted of theft who are not removable for having been convicted of a "theft offense" under the Ninth Circuit's approach may be removable under Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. 1227(a)(2)(A)(i), for having been convicted of a "crime involving moral turpitude." But that provision has a narrower reach than the one allowing removal of aggravated felons in at least two respects, and the former therefore excludes many theft crimes that are covered by the latter. First, while a crime involving moral turpi-

tude must have been committed within a certain period after admission to the United States (ordinarily five years) to qualify as a removable offense, 8 U.S.C. 1227(a)(2)(A)(i)(I), there is no such limitation for a theft offense, 8 U.S.C. 1101(a)(43)(G). Second, while a theft is ordinarily deemed to involve moral turpitude "only when a permanent taking is intended," *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1350 n.12 (BIA 2000), a crime may be a "theft offense" under the INA "even if [the intended] deprivation is less than * * * permanent," *Penuliar*, 435 F.3d at 969 (citation omitted). Respondent himself relied on the requirement that a permanent taking be intended in arguing that his conviction was not for a crime involving moral turpitude, App., *infra*, 25a-27a, and the IJ, who ruled in respondent's favor on that issue, *id.* at 8a-9a, apparently did as well.

Apart from the fact that Section 237(a)(2)(A)(i) of the INA covers fewer theft crimes than the provision allowing removal of aggravated felons, there are several restrictions on the government's ability to remove an alien convicted of a crime involving moral turpitude that do not apply to an alien convicted of a theft offense. Unlike an alien convicted of a theft offense (and thus an aggravated felony), an alien convicted of a crime involving moral turpitude may be eligible for asylum, see 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); is eligible for cancellation of removal if the alien is a lawful permanent resident, see 8 U.S.C. 1229b(a)(3); is not subject to expedited procedures for issuance of an order of removal, see 8 U.S.C. 1228(b); and is eligible to reenter the United States after five years, see 8 U.S.C. 1182(a)(9)(A).

But there is a more fundamental reason why the government's ability to remove an alien convicted of a crime involving moral turpitude would be unlikely to mitigate

the effect of *Penuliar*: the Ninth Circuit may well extend to a "crime involving moral turpitude" its holding that aiding and abetting is not encompassed by the generic definition of "theft offense." Indeed, it has already done so, albeit in an unpublished decision. In *Alvarado Velazquez* v. *Gonzales*, 131 Fed. Appx. 524 (9th Cir. 2005), the alien had been "charged with violating Cal. Veh. Code § 10851(a)" and "ultimately pleaded guilty to the charge." *Id.* at 525. The Ninth Circuit explained that "the record of conviction does not indicate whether he was charged or pleaded guilty to the count as a principal, as an accessory, or as an accomplice," and, citing *Penuliar*, it held that the government had therefore "failed to establish that Alvarado was convicted of a crime involving an element of moral turpitude." *Ibid.*

4. The holding of *Penuliar* may well be extended, not only to crimes involving moral turpitude, but to virtually every crime (in addition to a theft offense) that constitutes an aggravated felony under 8 U.S.C. 1101(a)(43), and, for that matter, to every crime that is a basis for removal, see 8 U.S.C. 1227(a)(2). The rationale for the Ninth Circuit's rule is that aiding and abetting a theft does not require the taking of or exercise of control over property, which the court deemed an essential element of the generic definition of "theft offense." *Penuliar*, 435 F.3d at 970. While, under the Ninth Circuit's approach, there may be some offenses whose generic definition is satisfied by aiding and abetting, there are not likely to be many. For example, one can aid and abet "murder," 8 U.S.C. 1101(a)(43)(A), without personally taking the life of another; one can aid and abet "rape," *ibid.*, without engaging in forcible sex; one can aid or abet a "crime of violence," 8 U.S.C. 1101(a)(43)(F), without using, attempting to use, or

threatening to use force, and without engaging in conduct that, by its nature, involves a substantial risk that force will be used, 18 U.S.C. 16; one can aid and abet "burglary," 8 U.S.C. 1101(a)(43)(G), without entering or remaining in a building, *Taylor*, 495 U.S. at 599; and so on. The novel principle applied by the Ninth Circuit—that a statutory offense does not categorically satisfy the generic definition of an offense when there is a possibility of aiding-and-abetting liability—thus has few obvious limits. And if the holding of *Penuliar* is taken to its logical conclusion, it will potentially affect far more than the 8000 removal orders or proceedings in the Ninth Circuit that involve a "theft offense."

5. Section 101(a)(43)(U) of the INA, 8 U.S.C. 1101(a)(43)(U), provides that the definition of "aggravated felony" includes "an attempt or conspiracy to commit an offense described in this paragraph." As part of proposals for comprehensive reform of the immigration laws, two pending bills would amend that provision to make explicit that the definition of "aggravated felony" includes aiding and abetting. The House bill would amend Section 101(a)(43)(U) to provide that "aggravated felony" includes "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or an attempt or conspiracy to commit an offense described in this paragraph." Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., 1st Sess. § 201(a)(3) (passed Dec. 16, 2005). Under the House bill, the amendment would "apply to offenses that occur before, on, or after the date of the enactment of this Act." *Id.* § 201(b). The Senate bill would amend Section 101(a)(43)(U) to provide that "aggravated felony" includes "aiding or abetting an offense described in this paragraph, or soliciting, counseling,

procuring, commanding, or inducing another, attempting, or conspiring to commit such an offense." Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess. § 203(a)(5) (passed May 25, 2006). Under the Senate bill, the amendment would "apply to any act that occurred on or after the date of the enactment of this Act." *Id.* § 203(b)(1)(B).

No conference committee has yet been appointed to reconcile the two bills, which differ in certain significant respects. If a conference committee is convened, if a reconciled bill emerges and is enacted into law, and if the law amends Section 101(a)(43)(U) of the INA to explicitly include aiding and abetting and provides that the amendment applies to offenses antedating the law's enactment, it might be appropriate for this Court to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the new law. At this point, however, it is uncertain whether those events will come to pass. If they do, the Court can act on the petition accordingly.[13]

---

[13] The fact that the current version of Section 101(a)(43)(U) includes attempt and conspiracy but not aiding and abetting, and that Congress is contemplating amending the provision to add aiding and abetting, does not mean that the Congress that enacted the current version intended to exclude aiding and abetting from the definition of "aggravated felony." Unlike aiding and abetting, attempt and conspiracy are distinct from the underlying offense, see, *e.g.*, *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946) (conspiracy); 2 LaFave, *supra*, § 11.2, at 207 (attempt), and thus would not constitute an aggravated felony unless Congress explicitly so provided. Indeed, the express inclusion of attempt and conspiracy, which often involve actions further removed from the underlying primary criminal conduct than aiding and abetting, only underscores the anomaly introduced by the Ninth Circuit's decision. Accordingly, as the Judiciary Committee Report accompanying the pending House bill explains, the purpose of adding aiding and

D. This Case Is The Most Suitable Vehicle For Deciding Whether The Ninth Circuit's Rule Is Correct

Under the INA, "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). The Ninth Circuit treats this requirement as jurisdictional, see *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (2004), as do a number of other courts of appeals, see *Popal* v. *Gonzales*, 416 F.3d 249, 252 (3d Cir. 2005); *Un* v. *Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004); *Foster* v. *INS*, 376 F.3d 75, 77 (2d Cir. 2004) (per curiam); *Wang* v. *Ashcroft*, 260 F.3d 448, 452 (5th Cir. 2001); *Fernandez-Bernal* v. *Attorney General of the United States*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam). In its petition for rehearing in *Penuliar*, in addition to challenging the Ninth Circuit's decision on the merits, the government contended that Penuliar had failed to exhaust his administrative remedies. Reh'g Pet. at 12-13, *Penuliar* v. *Gonzales* (No. 03-71578). The Ninth Circuit denied the rehearing petition without addressing that contention in its amended opinion.

Notwithstanding the Ninth Circuit's failure to address the issue, there is a substantial question whether Penuiliar satisfied the INA's exhaustion requirement, and thus whether the court of appeals had jurisdiction.[14]

---

abetting to Section 101(a)(43)(U) is simply to "make[] clear" that it is included in the definition of aggravated felony and to "reverse" contrary "Ninth Circuit precedent." H.R. Rep. No. 345, 109th Cong., 1st Sess. 59 (2005).

[14] In his notice of appeal to the BIA, one of the "reason(s) for this appeal" identified by Penuliar was that "[i]t is not clear that the crimes

There is a similar exhaustion question in the other cases, cited above (at p. 16), in which the Ninth Circuit granted a petition for review on the basis of *Penuliar*. In this case, by contrast, no exhaustion question is present. Before both the IJ and the BIA, respondent unequivocally took the position that he had not been convicted of a "theft offense" (and thus an aggravated felony), App., *infra*, 16a-22a, 24a, 28a-31a, and he specifically argued that his crime of conviction was not a theft offense because a defendant can be convicted of violating California Vehicle Code § 10851(a) under an aiding-and-abetting theory, App., *infra*, 20a-21a, 29a-30a.

Since there is a threshold issue in *Penuliar* (and the other cases cited above) but not in this case, this case is the most suitable vehicle for deciding whether the generic definition of "theft offense" includes aiding and abetting. We are therefore seeking plenary review in this case. We are also filing a certiorari petition in

---

set out in the Notice to Appear [for removal proceedings] are aggravated felonies." A.R. at 23, *Penuliar, supra*. And in his brief before the BIA, one of the two issues identified in the "Statement of Issues" was "[w]hether the Immigration Judge erred in finding Appellant had been convicted of an aggravated felony and [was] therefore[] ineligible for relief under § 240A(a) of the Immigration and Nationality Act," which governs cancellation of removal, 8 U.S.C. 1229b(a). A.R. at 7, *Penuliar, supra*. In the "Argument" section of the brief, however, Penuliar did not contend that either of the offenses on which his removal was based was not an aggravated felony. Instead, he raised only a constitutional argument concerning the availability of discretionary relief from removal. *Id.* at 9-10. And nowhere in either his notice of appeal or his brief did Penuiliar say anything that remotely resembles the aiding-and-abetting theory ultimately adopted by the court of appeals.

Penuliar, and asking the Court to hold the petition in that case pending its decision in this one.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
DONALD E. KEENER
JOHN ANDRE
Attorneys

JUNE 2006

---

[15] In its brief in the court of appeals in this case, the government acknowledged that *Penuliar*'s holding was "circuit precedent" and "controlling of the outcome of th[e] petition for review," and that the petition therefore "should be remanded to the BIA for further proceedings in light of *Penuliar*." C.A. Br. 5. That acknowledgment is not an obstacle to review by this Court. A party has no obligation to "demand overruling of a squarely applicable, recent circuit precedent" when the precedent "was established in a case to which the party itself was privy and over the party's vigorous objection." *United States* v. *Williams*, 504 U.S. 36, 44 (1992). Instead, "a claim is preserved if made by the current litigant in 'the recent proceeding upon which the lower court[] relied for [its] resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent.'" *United States* v. *Vonn*, 535 U.S. 55, 58-59 n.1 (2002) (quoting *Williams*, 504 U.S. at 45). Those conditions are satisfied here.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-74471
Agency No. A72-984-337

LUIS ALEXANDER DUENAS-ALVAREZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
RESPONDENT

On Petition For Review Of An Order
Of The Board Of Immigration Appeals

Submitted Apr. 13, 2006**
Decided Apr. 18, 2006

MEMORANDUM*

Before: SILVERMAN, MCKEOWN, and PEAZ, Circuit Judges.

Luis Alexander Duenas-Alvarez, a native and citizen of Peru, petitions pro se for review of the Board of

---

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Immigration Appeals' dismissal of his appeal of an immigration judge's order of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252.

The IJ found that Duenas-Alvarez's conviction for taking a vehicle without consent in violation of California Vehicle Code § 10851(a) categorically met the definition of a theft offense and, as such, qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43). As the government notes, we recently held that a violation of section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition of a theft offense under 8 U.S.C. § 1101(a)(3)(G). *See Penuliar v. Ashcroft*, 435 F.3d 961 (9th Cir. 2006). Accordingly, we remand this petition to the Board for further proceedings in light of *Penuliar*.

REMANDED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72-984-337 - IMPERIAL Date: Aug. 6, 2004

In re: S-DUENAS-ALVAREZ, LUIS ALEXANDER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: John J. Yap,
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge dated April 27, 2004. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent's conviction for auto theft constitutes an aggravated felony. Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000). Accordingly, the appeal is dismissed.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Imperial, California

File No.: A 72 984 337

IN THE MATTER OF
LUIS ALEXANDER DUENAS-ALVAREZ, RESPONDENT

Apr. 27, 2004

IN REMOVAL PROCEEDINGS

CHARGES:

Section 237(a)(2)(A)(i) of the Immigration and Nationality Act, as amended, in that you have been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a theft offense for which the term of imprisonment is at least one year.

APPLICATIONS: None submitted; oral motion and written motion to terminate proceedings.

ON BEHALF OF RESPONDENT:
Elisa C. Brasil
Law Offices of Kaiser & Capeci
633 Battery Street, 6th Floor
San Francisco, California 94111

ON BEHALF OF DHS:
John Yap
Assistant Chief Counsel
1115 North Imperial Avenue
El Centro, California 92253

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department issued the Notice to Appear January 16, 2004, setting forth the above two grounds of deportability as the basis for his removal from the United States. The document was personally served upon the respondent January 21, 2004, and filed with the Immigration Court February 3, 2004.

The respondent appeared before the Immigration Court via televideo conference from Calipatria State Prison in Calipatria, California. The respondent was placed under oath to tell the truth in these proceedings. It was determined that he was an inmate at the California Department of Corrections State Prison in Calipatria, California.

The respondent confirmed that his true name is as set forth on the Notice to Appear and that he had received a copy of the Notice to Appear. *See* Exhibit No. 1.

The respondent was advised of the purpose of the proceedings and why he was in Court. The respondent was advised of each of the rights for which he is entitled in these proceedings. The respondent stated that he understood the purpose of the proceeding and why he was in Court and each of the rights explained to him by the Court.

The respondent was read each of the allegations filed against him. He stated that he understood those and the two grounds of deportability were explained and he stated that he understood those.

The respondent confirmed that he received the list of legal services and the form setting forth his appeal rights in writing.

The respondent requested time to be able to retain counsel. That request was granted and the matter was continued.

At a subsequent hearing, the respondent appeared with counsel telephonically. Pursuant to his request and consent, the respondent confirmed that he wished to proceed with the attorney of record who had filed his E-28.

The respondent, through counsel, admitted that he is not a citizen or a national of the United States, that he is a native and citizen of Peru. The Court was advised that neither one of the respondent's parents were a citizen of the United States.

At the subsequent and final merits hearing in this matter, the respondent did advise the Court and the Court took into consideration that both of his parents are naturalized and become United States citizens. That is new information that he had gave after the original pleading was taken.

The respondent testified that some time before 1997 and 1998 his father became a United States citizen through naturalization and in 1998 his mother became a citizen. The respondent stated that his little sister became a citizen through his parents' naturalization because she was under 18 years of age at the time and that his big sister has also become a United States citizen by proceeding through the naturalization process on her own after being a lawful permanent resident for five years.

The respondent is now 29 years of age and testified that he was over the age of 18 when his parents became United States citizens.

The respondent admitted that he has been a lawful permanent resident of the United States since January 29, 1998. He immigrated through San Francisco, California. The respondent initially denied that he was convicted July 30, 2002, in the Superior Court of California, County of Marin, for the offense of taking a vehicle without consent in violation of Section 10851(a) of the California Vehicle Code. The respondent likewise denied allegation 8 and for that offense he was sentenced to confinement for a period of three years. The matter was continued to give the parties an opportunity to review the conviction records and counsel needed time to review the case and decide what country to designate in the event removal became necessary.

The matter was continued. At a subsequent hearing, the respondent, through counsel, admitted the conviction alleged in allegation no. 7 and the sentence that was imposed as alleged in allegation no. 8.

The issue remaining in the case is whether the respondent is subject to removal as charged. Counsel

was going to file with the Court and was given dates for doing so, a motion to terminate and was making an oral motion for the same purpose.

The matter came on for a hearing on today's date. Previously, counsel had filed a written motion to terminate. That is marked into evidence and admitted as Exhibit No. 2. The Government submitted their response which was marked as Exhibit No. 3 and admitted into evidence. Also admitted into evidence today is the conviction record consisting of Exhibit No. 4. It was admitted without objection.

Basically the parties are submitting the matter on the written motions.

Counsel for the respondent appearing today raised an issue about the delivery of the information in the charging document in the criminal court case having occurred after preparing and filing their motion to terminate with the Court and service that document upon Government counsel.

The parties basically asserted the arguments made in their pleadings.

No other documents or evidence was offered.

The Court has had an opportunity to review the respondent's pleading for a motion to terminate in this case. The Court's had an opportunity to review the Government's response. The Court's likewise had an opportunity to review the conviction record, more specifically the language of count 1.

The Court makes the finding at this time that the conviction suffered by the respondent as alleged in allegation no. 7, the taking of a vehicle without consent in violation of Vehicle Code Section 10851(a) of the

California Vehicle Code as charged specifically in this case and statutorily does not meet the definition of a crime involving moral turpitude. That ground of deportability is not sustained.

The Court is satisfied that the conviction does constitute an aggravated felony theft offense. The Court has taken into consideration that the last phrase that is alleged in the substantive charge is "with or without intent to steal the vehicle."

The Court does find, however, that it is clear that the purpose of this is without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle meets the precedent decisions and authority in the definition of a theft offense under case law.

The Court is satisfied that this particular conviction as pled in Exhibit No. 4 meets the aggravated felony definition.

Having made that finding, the Court finds that the respondent is subject to removal from the United States. He has been convicted of a theft offense which is an aggravated felony.

The only issue remaining in the case is is he eligible for deportability for relief. No applications have been filed and the citizenship issues are apparent. No petitions have been filed on behalf of the respondent pursuant to counsel for the respondent.

The respondent designated Peru as the country for removal. The respondent indicates that he does have a concern about returning to Peru because he has been raised in the United States for many years, that he would have to start life over there. He is unfamiliar

with how to work in that country and other types of issues.

It does not appear that there is any valid or viable request being asserted for withholding of Article 3 protection under the Convention against Torture and, in fact, previously the Court was advised by counsel of record that no applications for relief would be filed if the charge of deportability was sustained that he was deportable with an aggravated felony conviction.

Based upon the evidence of record, the respondent is subject to removal on the aggravated felony ground. No applications apply in this case nor have been sought. The following order issues:

ORDER

THE RESPONDENT IS HEREBY ORDERED removed from the United States to Peru as charged based upon an aggravated felony theft conviction.

DATED: April 27, 2004

DENNIS R. JAMES
Immigration Judge

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

[Not to be used for multiple count convictions or for 1/3 consecutive sentences.]

[X] SUPERIOR COURT OF CALIFORNIA COUNTY OF MARIN [ ] MUNICIPAL BRANCH OR JUDICIAL DISTRICT		
PEOPLE OF THE STATE OF CALIFORNIA vs DEFENDANT LUIS ALEXANDER DUENAS-ALVAREZ AKA CII BOOKING #	DOB: 07-09-74 [ ] NOT PRESENT	CASE NUMBER SC123517A
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT	[ ] AMENDED ABSTRACT	
DATE OF HEARING 08-23-02	DEPT NO. D	JUDGE JOHN STEPHEN GRAHAM
CLERK KATHY BECK	REPORTER ELAINE NINKOVICH	PROBATION NO. OR PROBATION OFFICER STEVE SHAPIRO
COUNSEL FOR PEOPLE LORI FRUGOLI	COUNSEL FOR DEFENDANT DPD CHRISTINE O'HANLON	[X] APPTD.

1. Defendant was convicted of the commission of the following felony:

CNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DATE/YEAR)	CONVICTED BY: JURY	COURT	PLEA	TRIAL	TIME IMPOSED: YRS	MOS.
1	PC	10851(A)	AUTO THEFT	2002	07-30-02			X	U	3	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

CNT	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. [ ] Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes)
5. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
   a. RESTITUTION FINE of: $2000 per PC 1202.4(b) forthwith per PC 2085.5
   b. RESTITUTION FINE of: $ ___ per PC 1202.45 suspended unless parole is revoked.
   c. RESTITUTION of: $____ per PC 1202.4(f) to [X] victim(s)* [ ] Restitution Fund
      (*List victim name(s) if known and amount breakdown in item 7, below.)
      (1) [X] Amount to be determined. (2) [ ] Interest rate of: ___% (not to exceed 10% per PC 1202.4(f)(3)(F)).
   d. [ ] LAB FEE of: $_____ for counts _____ per H&SC 11372.5(a).
   e. [ ] DRUG PROGRAM FEE of $150 per H&SC 11372.5(a). f. [ ] FINE of $ ____ per PC 1202.5
6. TESTING: [ ] AIDS [ ] DNA pursuant to [ ] PC 1202.1 [ ] PC 290.2 [ ] other (specify)
7. Other orders (specify):

**DEFENDANT TO RECEIVE NO TIME CREDITS IN THIS CASE AS ALL TIME CREDITS ATTRIBUTABLE TO SC 124735A- A MISDEMEANOR

8.

TOTAL TIME IMPOSED:	3	0

9. [ ] This sentence is to run concurrent with (specify):

10. Execution of sentence imposed
    a. [X] at initial sentencing hearing.
    b. [ ] at resentencing per decision on appeal
    c. [ ] after revocation of probation.
    d. [ ] at resentencing per recall of commitment (PC 1170(d).)
    e. [ ] other (specify):

11.

DATE SENTENCE PRONOUNCED	CREDIT FOR TIME SPENT IN CUSTODY	TOTAL DAYS: 0 INCLUDING	ACTUAL LOCAL TIME 0	LOCAL CONDUCT CREDITS 0	[ ] 4019 [ ] 2933.1	SERVED TIME IN STATE INSTITUTION [ ] DMH [ ] CDC [ ] CRC
08-23-02						

12. The defendant is remanded to the custody of the sheriff [X] forthwith [ ] after 48 hours excluding Saturdays, Sundays, and holidays.
    To be delivered to [X] the reception center designated by the director of the California Department of Corrections.
    [ ] other (specify):

CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
/s/ Illegible	08-23-02

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

ر

APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

LUIS ALEXANDER DUENAS-ALVAREZ AKA DUENAS,
LUIS ALEXANDER, DEFENDANT(S)

[Filed: Apr. 17, 2002]

INFORMATION

The District Attorney of the County of Marin, hereby accuses the said defendant(s) of the following crime(s), committed in the County of Marin, State of California:

* * * * *

Count: 001, on or about March 2, 2002, the crime of taking a vehicle without the owner's consent, in violation of section 10851(a) of the Vehicle Code, a felony, was committed by Luis Alexander Duenas-Alvarez, who at the time and place last aforesaid did willfully and unlawfully drive or take a certain vehicle, to wit: 1992 Honda Accord, California license number 3JHJ638,, then and there the personal property of Deborah and Michael Wood, D without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle, with or without intent to steal the vehicle.

It is further alleged that said defendant(s), Luis Alexander Duenas-Alvarez, was convicted of the following felonies, to wit: auto burglary in violation of section 459 of the Penal Code, on or about December 15, 1992 in the Superior Court of the State of California, for the County of Marin, case number SC040996A; auto burglary in violation of section 459 of the Penal Code, on or about December 15, 1992 in the Superior Court of the State of California, for the County of Marin, case number SC041748A; possession of firearm by a felon in violation of section 12021(a) of the Penal Code, on or about February 17, 1994 in the Superior Court of the State of California, for the County of Marin, case number SC052654A, within the meaning of Penal Code section 1203(e)(4).

It is further alleged that said defendant(s) Luis Alexander Duenas-Alvarez, was on and about February 17, 1994, in the Superior Court of the State of California, for the County of Marin, case number SC052654A, convicted of the crime(s) of possession of firearm by a felon, in violation of section 12021(a) of the Penal Code, and that he/she then served a separate term in state prison and/or federal prison for said offense, and that he/she did not remain free of prison custody for, and did 7commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code section 667.5(B).

All of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

PAULA FRESCHI KAMENA
DISTRICT ATTORNEY FOR THE
COUNTY OF MARIN
STATE OF CALIFORNIA

By [ILLEGIBLE]
Assistant DISTRICT ATTORNEY

APPENDIX F

EXECUTIVE OFFICE OF IMMIGRATION APPEALS
BOARD OF IMMIGRATION APPEALS,
VIRGINIA

INS File No.: A#72-984-337

IN THE MATTER OF DUENAS-ALVAREZ,
LUIS ALEXANDER, RESPONDENT

Dated: 7/20/2004
[Filed: July 29, 2004]

BRIEF IN SUPPORT OF APPEAL

TABLE OF CONTENTS

Arguments 2
Conclusion 7

I

ARGUMENTS

The Immigration Judge (I.J.) erred in determining that the actual offense which respondent was convicted of was a "theft offense" under Section 101(a)(43)(G) of the Immigration Nationality Act. The I.J. chose to overlook respondent's charging documents (the information) which basically added strength to respondent motion to terminate. The I.J. erroneously denied respondent's motion to terminate and based his decision on looking at the judgment of conviction and concluded without analyzing the specific characteristic of the respondent offense, that respondent's 2002 auto theft conviction, by the very title of the offense, satisfied the "theft offense" definition of aggravated felony.

The Government could not sustain their burden of proof with the information in respondent case which contains the language of the elements of crime, "permanently or temporarily deprived of said owner of title with or without intent to steal the vehicle" which would bear on the issue of whether respondent conviction qualified as an aggravated felony, because it cannot meet the generic definition of theft.

If theft in fact must involve a permanent taking, a conviction under a statute that allows conviction for temporary or permanent taking would not qualify as an aggravated felony under a theft theory. Such statutes would therefore be divisible: the portion that forbids permanent taking (or taking with intent to permanently deprive the owner) would constitute "theft"; the portion that is violated even if the intent is only temporary to deprive the owner would not constitute "theft". The information in respondent case does not specify

whether the conviction was under the permanent or temporary intent element. Therefore, the government was not able to sustain its burden of proving "theft" by clear and convincing evidence. Where the statute of conviction has distinct, numbered subdivisions and the record of conviction does not establish which subdivision constitutes the statute of conviction, the conviction will not be considered deportable unless each subdivision triggers deportation.

See Nevarez-Martinez v. INS, F.3d, 2003 WL 1878279 (9th Cir. April 16, 003). Respondent signed a plea agreement for Section 10851(a) V.C. to be punish by imprisonment in county jail, for not more than one year or in the state prison for a period of 16 months, 2 years or 3 years. The Government cannot tell from the mere fact of respondent conviction that respondent knew the vehicle was stolen, that the vehicle was taken or control was exercised with the requisite criminal intent.

U.S. v. Sacramento Cruz-Mandujano, 51 Fed. Appx. 721; (9th Cir. 2002). This court has set forth a generic definition of "theft offense" to require "a taking of property or an exercise of control over property." Section 10851(a) V.C. is likewise broader than the generic definition, so it is not categorically a theft offense. Congress is presumed to be familiar with Supreme Court precedent and to expect that its enactments will be interpreted accordingly. Therefore, in the absence of legislative history to the contrary, the Ninth Circuit must assume that Congress intended the term "theft offense" at Section 101(a)(43)(G) to be interpreted consistently with the Supreme Court's definition of the term in Taylor. The Ninth Circuit, following Taylor vs. United States, developed a modern, generic definition

for "theft offense." The court looked at common law larceny, but believed that Congress intended to broaden the definition because the IIRIRA of 1996. Taylor precludes the use of the specific definition used by the state of conviction. Rather, Taylor instructs that when Congress described predicate offenses, it meant to incorporate "the generic sense in which the term is now used in the criminal codes of most States." This guidance is particularly apt in the present context, because Congress used the words "theft offense" rather than just "theft," thus, including that the phrase ought to be read to incorporate different but closely related constructions in modern states statutes.

The modern, generic, and broad definition of the entire phrase "theft offense (including receipt of stolen property)" is a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. The legislative history of defining aggravated felonies under INA Section 101(a)(43) was to address serious crimes. See H.R. Rep. No. 104-22, at 5 (1995) ("[these amendments] address the problems of aliens who commit serious crimes wile they are in the United States and . . . give Federal law enforcement officials additional means with which to combat organized immigration crime.")

The immigration consequences to an alien convicted of an "aggravated felony" are significant. Given the profound consequences of the designation and the declare purpose of congress to target "serious crimes," it is doubtful that Congress intended to include crimes such as 10851(a) of the California Vehicle Code within the ambit of the definition of "serious crimes." The

Ninth Circuit in Corona-Sanchez has held California's basic theft statute, was an overbroad divisible statute, with respect to the generic definition of "theft" employed in the aggravated felony definition, because it included a number of nontraditional grounds of conviction, including theft of services, causing another to produce a false credit report, and aiding and abetting. Aiding and abetting conduct was not included within the generic definition of theft, since aiding and abetting a theft permitted conviction where the respondent neither took nor exercise control over property.

In Huerta-Guevara v. Ashcroft, the Ninth Circuit granted a petition for review and vacated a removal order predicated on an Arizona conviction of possession of a stolen vehicle, in violation A.R.S. Section 13-1802, holding the conviction did not fall within the generic definition of "theft offense" necessary to constitute an aggravated felony under INA section 101(a)(43)(G), adopted by the circuit en banc in Corona-Sanchez v. INS.

The court held under the categorical approach, that the Arizona statute was overbroad, with respect to the generic definition of "theft offense," in three respects. The Arizona statute prohibited "theft of services," which are not considered property and therefore fell outside the generic definition of theft. The statute prohibited aiding and abetting, which also fall outside the generic definition of theft. The Arizona statute "is a divisible statute, four subparts of which do not require intent." Therefore, "the conduct proscribed by Section 13-1802 extends beyond the term 'theft offense.' Accordingly, a conviction under A.R.S. Section 13-1802 does not facially qualify as a theft offense that is an aggravated felony under the INA".

II
CONCLUSION

The Judge erred in determining that respondent's 10851(a) of The California Vehicle Code conviction qualified as an aggravated felony under Section 101(a)(43)(G) of the INA. Also the I.J. erroneously denied Respondent's motion to terminate after overlooking Respondent's devisable statute in the Charging documents (The Information) presented by the government. Thus, the government did not meet their burden of proof with clear and convincing evidence.

Respectfully submitted,

DATED: 7/20/2004

/s/ [ILLEGIBLE]
DUENAS-ALVAREZ, LUIS ALEXANDER
In Pro se

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1115 NORTH IMPERIAL AVENUE
EL CENTRO, CALIFORNIA 92243

File No.: A72-984-337

IN THE MATTER OF, DUENAS-ALVAREZ,
LUIS ALEXANDER, RESPONDENT

[Filed: Mar. 30, 2004]

Next Hearing Date:	Mar. 31, 2004
Next Hearing Time:	8:30 A.M.
Before Honorable Immigration Judge:	Dennis R. James

MOTION TO TERMINATE

I. INTRODUCTION

Respondent, Mr. Luis A. DUENAS-ALVAREZ (A72-984-337), by and through his undersigned counsel, now hereby moves for this Court to terminate these Removal Proceedings. First, Respondent has not been convicted of a "crime involving moral turpitude" (hereinafter "CIMT"). California Vehicle Code (hereinafter "CVC") Section 10851(a) is not always a CIMT. Therefore, he is not removable under Immigration and Nationality Act (hereinafter "INA") Section 237(a)(2)(A)(i)

(regarding removability due to one CIMT conviction within five years of admission).

Second, CVC Section 10851(a) is not necessarily an "aggravated felony," as defined in INA Section 101(a)(43)(G) (regarding a "theft" offense with a one year term of imprisonment). Specifically, CVC Section 10851(a) is not a necessarily a "theft offense," as defined in INA Section 101(a)(43)(G). Hence, Respondent is not removable under INA Section 237(a)(2)(A)(iii) (regarding removability for a conviction of an "aggravated felony" at any time after admission).

That is, CVC Section 10851(a) is not CIMT, and CVC Section 10851(a) is not a "theft offense" (and therefore it is not an "aggravated felony"), as discussed below. As such, Respondent is not removable under INS Section 237(a)(2)(A)(i) (regarding a CIMT conviction), nor is he removable under INA Section 237(a)(2)(A)(iii) (regarding an "aggravated felony" "theft offense"). Because he is not removable under the only two charges within the charging document (*i.e.*, Form I-862, Notice to Appear), Respondent respectfully requests that this Court terminate these Removal Proceedings.

II. STATEMENT OF PERTINENT FACTS

Respondent is a male, native and citizen of Peru, who was admitted to the United States as a Lawful Permanent Resident Alien (hereinafter "LPR") in January 1998. He remains an LPR. On January 21, 2004, the Department of Homeland Security (hereinafter "DHS") alleged (at factual allegation number seven) that Respondent was convicted in the Superior Court of California, County of Marin, for his violation of CVC Section 10851(a) ("Taking a Vehicle Without Consent") on July 30, 2002. On that date, the DHS

charged Respondent as removable from the United States under INA Section 237(a)(2)(A)(i) (asserting that CVC Section 10851(a) is a CIMT) and under INA Section 237(a)(2)(A)(iii) (asserting that CVC Section 10851(a) is an "aggravated felony" "theft offense").

Respondent was convicted in the Superior Court of California, County of Marin, for a violation of CVC Section 10851(a) ("Taking a Vehicle Without Consent") in 2002, for which he was sentenced to the term of three years in the state prison.[1] *See* Form I-862 (Notice to Appear). Respondent now moves to terminate these Removal Proceedings, as a conviction under CVC Section 10851(a) is neither a CIMT conviction nor an "aggravated felony" conviction (because it is not a "theft offense").

III. ARGUMENT

A. RESPONDENT'S CONVICTION UNDER CVC SECTION 10851(a) IS NOT A CIMT CONVICTION; THEREFORE, RESPONDENT IS NOT REMOVABLE UNDER INA SECTION 237(a)(2)(A)(i)

In order to determine whether an individual has been convicted of a CIMT, one must first look to the statute under which the person has been convicted. *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000); *United States v. Rivera Sanchez*, 247 F.3d 905 (9th Cir. 2001); *Matter of L-V-C-*, Interim Decision 3382 (BIA 1999); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992); *Beltran-Triado v. INS*, 213 F.3d 1179 (9th Cir. 2000). If the statute is overly-broad, including

---

[1] Undersigned counsel received this information from Respondent's Public Defender, Christine O'Hanlon, Esq., of the Office of the Public Defender in San Rafael, California.

elements to many offenses, then one must look to charging papers and jury instructions to ascertain whether the alien's conduct meets the federal definition of a crime. *Taylor v. United States*, *supra*, 495 U.S. at 602. However, one can*not* look to the facts underlying the conviction in order to determine whether an alien has been convicted of an alleged crime. *Id.*

The Board of Immigration Appeals (hereinafter "BIA") has held a CIMT refers generally to conduct that is inherently base, vile, or depraved. *Matter of L-V-C-*, *supra* Int. Dec. 3382, *Matter of Tran*, *supra* 21 I&N Dec. at 291; *Matter of Serna*, *supra* 20 I&N Dec. at 579, *Beltran-Triado v. INS*, *supra* 213 F.3d at 1179 (convictions for false information on a Form I-9 and for a false Social Security Number are not convictions of CIMT's).

The BIA has determined that where the record of conviction does not show an *intent* to *permanently* deprive the owner, the conviction is not a CIMT. *Matter of D*, 1 I&N Dec. 143 (BIA 1941); *Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of N*, 3 I&N Dec. 723 (BIA 1949).

In *Matter of D*, *supra* 1 I&N Dec. at 143, the BIA held that former CVC Section 501 was not a CIMT because the temporary taking of a vehicle was "pure prankishness," as opposed to turpitudinous. Former CVC Section 501 was the forerunner statute to CVC Section 10851(a). Former CVC Section 501 has substantially the same elements as CVC Section 10851(a). Both provisions punish the "tak[ing] [of] a vehicle . . . with intent either to permanently or temporarily deprive the owner . . . whether with or without intent to steal the vehicle. . ." *See* CVC Section 10851(a).

Here, at factual allegation number seven, the DHS alleges that Respondent was convicted under CVC Section 10851 for "Taking a Vehicle Without Consent." *See* Form I-862 (Notice to Appear). Respondent was convicted for the offense of "Taking a Vehicle Without Consent," but such an offense is not turpitudinous because the record of conviction does not necessarily include the intent to *permanently* deprive the owner of his or her vehicle (and it may include only temporary deprivation). *Matter of M*, *supra* 2 I&N Dec. at 868; *Matter of N*, *supra* 3 I&N Dec. at 723. Such a "prank" is not turpitudinous. *Matter of D*, *supra* 1 I&N Dec. at 143.

Without the intent to *permanently* deprive the vicitm of his or her vehicle, Respondent's conviction under CVC Section 10851(a) is not a CIMT. Unless the DHS demonstrates that said conviction punished an intent to permanently deprive (within the record of conviction, such as the within the information, an indictment, or a complaint), this Court cannot sustain the charge of removal under INA Section 237(a)(2)(A)(i) because the BIA states that a crime for the temporary deprivation of a vehicle is not a CIMT. *Matter of M*, *supra* 2 I&N Dec. at 686; *Matter of N*, *supra* 3 I&N Dec. at 723.

Because Respondent's "prankishness" may have caused him to only temporarily deprive the owner of a vehicle, Respondent's conviction under CVC Section 10851 is not a CIMT conviction. *Matter of D*, *supra* I&N Dec. at 143. Because said conviction is not a CIMT conviction, Respondent is not removable under INA Section 237(a)(2)(A)(i). Consequently, this Court should dismiss this charge of removal.

B. RESPONDENT'S CONVICTION UNDER CVC SECTION 10851(a) IS NOT A CONVICTION FOR A "THEFT OFFENSE;" THEREFORE, RESPONDENT IS NOT REMOVABLE UNDER SECTION 237(a)(2)(A)(iii)

In order to determine whether an individual has been convicted of a "theft offense" (as defined in INA Section 101(a)(43)(G)), one must first look to the statute under which the person has been convicted. *Taylor v. United States, supra*, 492 U.S. at 602; *Ye v. INS, supra* 214 F.3d at 1128; *United States v. Rivera-Sanchez, supra* 247 F.3d at 905. If the statute is overly-broad, including elements to many offenses, then one must look to charging papers and jury instructions to ascertain whether the alien's conduct meets the federal definition of "theft." *Taylor v. United States, supra* 495 US. at 602. However, one can*not* look to the facts underlying the conviction in order to determine whether an alien has been convicted of an alleged crime. *Id.*

In order to qualify as a "theft offense" under INA Section 101(a)(43(G), it must meet the "uniform definition [of theft] independent of the labels used by state code." *Taylor* v. *United States, supra* 495 U.S. a 602; Ye *v. INS, supra* 214 F.3d at 1128; *USA v. Hector-Marquest*, 2000 US App. Lexis 18372 (9th Circuit, July 20, 2000) (reiterating the "uniform definition" approach for "theft offense"); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (using the "uniform definition" approach for "theft offenses"); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000) (using the "uniform definition" approach for "theft offenses").

If the statute is overly broad, including elements to many offenses, then one must look to the record of conviction, including charging papers and jury instructions,

to ascertain whether the alien's actual conviction meets the "uniform definition" of a crime. *Taylor v. United States*, *supra* 495 U.S. at 602; *Matter of Sweetser*, Int. Dec. 3390 (BIA 1990); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Teixeria*, 21 I&N Dec. 316 (BIA 1996). In arriving at a "uniform definition" for theft, the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") and BIA have recognized that the term "theft" is the "'popular name for larceny.'" *USA v. Hector-Marquez*, *supra* 2000 US App. Lex at 18372; *In Re V-Z-S-*, *supra* Int. Dec. at 3434.

The Ninth Circuit has held that the definition of "theft" is "a taking of property or an exercise of control over property." *USA v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002). In *USA v. Corona-Sanchez*, *supra* 291 F.3d at 1207-08, the Ninth Circuit noted that California Penal Code (hereinafter "CPC") Section 484(a) ("petty theft") was broader than the generic federal definition of "theft" because CPC Section 484(a) allows for a conviction for only aiding and abetting (which falls outside the definition of "theft").

Likewise, CVC Section 10851(a) punishes,

> "any person who drives or takes a vehicle . . . with intent either to permanently or temporarily deprive the owner . . . *or any person who is a party or an accessory to or an accomplice in the driving or . . . taking . . .*" *See* CVC Section 10851(a) (emphasis mine).

As such, CVC Section 10851(a) is not necessarily within the definition of "theft" because "theft" does not include the mere aiding and abetting. One Panel of the Ninth Circuit held that a violation of CVC Section 10851(a) fell outside of the definition of "theft" (and therefore

was not an "aggravated felony") because it included punishing "a party, accessory or accomplice" in the "driving or . . . taking[,]" citing *USA v. Corona-Sanchez, supra* 291 F.3d at 1207-08. *USA v. Cruz-Mandujano*, 51 Fed. Appx. 721, 2002 U.S. App. LEXIS 24417 (unpub.) (Respondent includes this citation here because these facts and issues before this Court are the same as those found within this Ninth Circuit decision).

Because CVC Section 10851(a) is overly broad, one must look to the record of conviction to determine the offense for which Respondent was convicted. *Taylor v. United States, supra* 495 U.S. at 602; *Matter of Sweetser, supra* Int. Dec. at 3390; *Matter of Short, supra* 20 I&N Dec. at 136; *Matter of Teixeira, supra* 21 I&N Dec. at 316. Because Respondent may have been convicted as "a party, accessory or accomplice," Respondent's conviction does not necessarily fall within the definition of "theft." As such, this Court cannot find that Respondent was convicted of a "theft offense," as defined in INA Section 101(a)(43)(G). *Taylor v. United States, supra* U.S. at 602; *USA v. Cornora-Sanchez, supra* 291 F.3d at 1207-08).

As Respondent has not necessarily been convicted of "a theft offense . . . for which the term of imprisonment [is] at least one year[,]" Respondent has not been convicted of an "aggravated felony," as defined within INA Section 101(a)(43)(G). Because he has not necessarily been convicted of an "aggravated felony," Respondent is not removable under INA Section 237(a)(2)(A)(iii).

V. CONCLUSION

Because Respondent has not necessarily been convicted of either a CIMT or a "theft offense," he is

neither removable under INA Section 237(a)(2)(A)(i) (requiring a CIMT conviction) nor INA Section 237(a)(2)(A)(iii) (requiring a "theft" offense). That is, Respondent is not removable under either of the only two removal charges contained within the charging document. For the foregoing reasons, Respondent respectfully requests that this Court terminate these Removal Proceedings, permitting Respondent to remain an LPR.

Date: 03-29-2004

Respectfully submitted:

/s/ [ILLEGIBLE]
DOMINIC E. CAPECI
Attorney for Respondent